79-579

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1979

BERT FRANKLIN ERWIN II, ROBERT CHESTER AND JAMES DENNIS BROGLE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUBJECT INDEX

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No.

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NOW COME the Petitioners, BERT FRANKLIN ERWIN II, JAMES DENNIS BROGLE and ROBERT LAWRENCE CHESTER, and respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 3, 1979, rehearing En Banc denied September 6, 1979.

OPINIONS BELOW

The Petitioners were convicted by a jury of conspiracy to import a controlled substance, to-wit, marijuana (21 U.S.C. § 963) and conspiracy to possess with the in-

tent to deliver a controlled substance, to-wit, marijuana (21 U.S.C. § 846) on October 4, 1978 in the United States District Court for the Eastern District of Louisiana. On July 3, 1979 the Court of Appeals for the Fifth Circuit affirmed the judgment in an unpublished Summary Opinion (a copy of which is appended hereto as Appendix A). The Order of the United States Court of Appeals for the Fifth Circuit denying your Petitioners rehearing En Banc was entered September 6, 1979 (a copy of which is appended hereto as Appendix B).

JURISDICTION

In the criminal trial below, amongst other issues, the Petitioners challenged 14 United States Codes 89(a) on the grounds that as applied to your Petitioners it is repugnant to the Constitution. On July 3, 1979 the United States Court of Appeals for the Fifth Circuit entered an Order affirming the judgment of the United States District Court for the Eastern District of Louisiana sustaining the constitutionality of that law as applied.

The Petition for Rehearing En Banc was denied by the United States Court of Appeals for the Fifth Circuit on September 6, 1979.

The jurisdiction of this Honorable Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the investigatory detention and search of an American flag vessel on the high seas by a roving United States Coast Guard cutter for the purpose of monitoring compliance with all United States laws, that was conducted without a search warrant and not based on any articulable suspicion, violated the Fourth Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutionality of Section 89(a) of Title 14 of the United States Code is challenged herein. It states:

> § 89. Law enforcement.
>
> (a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

The Fourth Amendment, United States Constitution, provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

STATEMENT OF THE CASE

On June 3, 1978, the United States Coast Guard cutter *Durable* was on the high seas in the Gulf of Mexico on a two week fisheries enforcement patrol. (Tr. M.S.-8).[1] The *Durable* is a 210 foot warship carrying 3 inch guns, two fifty calibre machine guns, two forty calibre machine guns, and a military helicopter mounted on its deck. (Tr. M.S.-25). At the time in question, the *Durable* was cruising in a shipping lane for north bound fishing vessels, about seventy miles due south of the entrance to the Mississippi River. (Tr. M.S.-10, 32). Although the *Durable's* primary mission was the surveillance of Japanese Long-liner fishing vessels, Lieutenant James W. Moon testified that the "boarding of United States vessels is always an underlying mission to any mission we have." (Tr. M.S.-8).

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[1] Legend:
Tr. M.S. - refers to the transcript of proceedings at the Motion to Suppress, September 14, 1978.
Tr. - refers to the transcript of the trial October 3 & 4, 1978. (On file at United States District Court for the Eastern District of Louisiana.)

At approximately 9:30 A.M., the *Durable's* radar equipment picked up a "radar target" estimated to be twelve or thirteen miles away. (Tr. M.S.-9; Tr.-112). The *Durable* closed on the radar target and it was visually sighted at a distance of about six miles. (Tr. M.S.-8, 9). Lieutenant Moon testified that a shrimp vessel with normal outriggers was seen. The name of the shrimp vessel—the *Adeline Marie*—was printed on the bow and stern; and the home port of Mobile, Alabama was printed on the stern. (Tr. M.S.-10). Lieutenant Moon described the *Adeline Marie* as a typical Gulf shrimper with typical shrimping equipment; Commander Crosby, captain of the *Durable,* testified he was aware of no mechanical or other difficulties aboard the *Adeline Marie;* and First Class Petty Officer Arturo Lopez testified that he noticed nothing different about the *Adeline Marie* from any other vessels he had previously been aboard. (Tr.-74, 75, 136, 158). Both Customs Officer Carl Homer and Lieutenant Moon admitted that they had no knowledge of the *Adeline Marie* prior to the sighting. (Tr. M.S.-29, 42). Routine radio contact was established, and the *Adeline Marie* was ordered to heave to for boarding. (Tr. M.S.-11). She immediately complied. (Tr.-73).

A boarding party, consisting of Lieutenant Moon, Customs Officer Homer and four of the *Durable's* crewmen, proceeded to board the *Adeline Marie.* (Tr. M.S.-12). All of the members of the boarding party were armed with handguns, and one of the *Durable's* crewmen carried a Remington Model 870 Riot Gun. (Tr. M.S.-24). Lieutenant Moon explained that the boarding party was armed "[b]ecause when we do a safety check we're also enforcing other United States laws which could be criminal." (Tr.

M.S.-27). Bert Erwin, Jr., captain of the three man crew of the *Adeline Marie,* was informed by Lieutenant Moon that his vessel was being boarded to "check compliance with United States Law" and that he must produce his "document." (Tr. M.S.-12). After perusing the document, Lieutenant Moon told the captain he wanted to compare the official number on the document with the official number required to be permanently embossed below decks. (Tr. M.S.-14). Lieutenant Moon was informed by Mr. Erwin that he would not be able to see the main beam number because it was covered with cargo. (Tr. M.S.-15). The main hold was opened by members of the boarding party and bales of what after closer examination appeared to be marijuana were sighted. (Tr. M.S.-15). Lieutenant Moon and Customs Officer Homer testified that they began to smell marijuana at some time after boarding; however, the bales were completely out of sight until the search had commenced and the hatches were opened. (Tr. M.S.-14, 39, Tr.-6, 83). Lieutenant Moon thought that it was a crime to possess marijuana on the high seas and your Petitioners were arrested. (Tr. M.S.-27). On cross-examination, Lieutenant Moon admitted that the purpose of the stop was to see if the A*deline Marie* was carrying contraband, and to "look for anything at all . . . that may be a violation of any law." (Tr. M.S.-34, 35). Further, Lieutenant Moon testified that even prior to the boarding he had intended "to go throughout the vessel" to check for compliance with United States laws. (Tr.-142). No weapons were discovered aboard the *Adeline Marie.* (Tr.-14).

REASONS FOR ALLOWING THE WRIT

The statutory construction given 14 U.S.C. § 89(a) by the United States Court of Appeals for the Fifth Circuit sanctions government conduct of a type that this Honorable Court has found violative of Fourth Amendment rights. *Delaware* v. *Prouse,* —— U.S. ——, 99 S. Ct. 1391 (No. 77-1571, March 27, 1979); *Marshall* v. *Barlows, Inc.,* 436 U.S. 307, 98 S. Ct. 1816 (1978); *Camara* v. *Municipal Court,* 387 U.S. 523, 87 S. Ct. 1727 (1967); *See* v. *City of Seattle,* 387 U.S. 541, 87 S. Ct. 1737 (1967). The Fifth Circuit approach, that 14 U.S.C. § 89(a) grants the Coast Guard plenary authority to board a vessel beyond the twelve mile limit, without probable cause or any particularized suspicion, in order to conduct a safety and documentation inspection "and to look for obvious customs and narcotics violations," is in conflict with that taken by the United States Court of Appeals for the Ninth Circuit; as well as certain state appellate courts that have addressed this issue. *United States* v. *Warren,* 578 F.2d 1058 (5th Cir. 1979) *cert. denied sub. nom. Schick* v. *United States,* 434 U.S. 1016 (1978); *United States* v. *Odneal,* 565 F.2d 598 (9th Cir. 1977); *United States* v. *Piner,* —— F.2d —— (9th Cir., No. 78-2565, September 5, 1979); *People* v. *Nissen,* 412 N.Y.S. 2d 999 (Sup. Ct. 1979); *Casal* v. *State,* —— So. 2d —— (Fla. DCA, No. 78-2129, August 14, 1979). This Honorable Court has never ruled on the constitutionality of 14 U.S.C. § 89(a); however, early related decisions of this Court indicate that probable cause was thought a necessary adjunct to the exercise of Coast Guard boarding authority. *Maul* v. *United States,* 274 U.S. 501, 47 S. Ct. 735 (1927); *United States* v. *Lee,* 274 U.S. 559, 47 S. Ct. 746 (1927). Your

Petitioners submit that the instant Petition for Certiorari should be granted to resolve these important conflicts.

Under the principles articulated in *United States* v. *Martinez-Fuerte,* 428 U.S. 543, 96 S. Ct. 3074 (1976); and *United States* v. *Brignoni-Ponce,* 422 U.S. 873, 95 S. Ct. 2574 (1975), it appears settled that ordering a private fishing vessel on the high seas to heave to for boarding constitutes a "seizure" within the meaning of the Fourth Amendment. The inquiry then becomes whether the seizure and search of the *Adeline Marie* was "reasonable."

The Coast Guard is given statutory authority to board vessels on high seas by 14 U.S.C. § 89(a). § 89(a) does not limit this grant of authority with any of the traditional safeguards such as warrant provisions or guidelines limiting the scope or manner of such an intrusion. While the seizure and search of the *Adeline Marie* may have been authorized by statute, this fact does not establish that the government's conduct was in accordance with the requirements of the Fourth Amendment. *Almeida-Sanchez* v. *United States,* 413 U.S. 266, 93 S. Ct. 2535 (1973). Since the protection of the Fourth Amendment shelters American citizens wherever they may be in the world from unreasonable searches by our government, *Reid* v. *Covert,* 354 U.S. 1, 5-6, 77 S. Ct. 1222, 1225 (1957), your Petitioners submit that this Honorable Court should decide the Fourth Amendment's effect upon the literal provisions of 14 U.S.C. § 89(a).

As interpreted by the Fifth Circuit, 14 U.S.C. § 89(a) confers unlimited discretion on Coast Guard officers to board ships at sea in order to conduct safety and documentation checks and to look for obvious customs

and narcotics violations. *United States* v. *Warren, supra.* There is no statutory requirement that there be any probable cause or reasonable suspicion that safety or documentation regulations have been breached.

This broad authorization must be viewed in light of the actual nature of these safety and documentation inspections and the conduct and intent of those entrusted with executing them in order to be fully understood. Invariably, a documentation inspection culminates in an examination of the main beam number. This number is required by law to be permanently embossed on the ship, usually in some remote and inaccessible portion of the main hold. *United States* v. *Hillstrom,* 533 F. 2d 209 (5th Cir. 1976); *United States* v. *Odom,* 526 F. 2d 339 (5th Cir. 1976). Examination of the main beam number in a shrimping vessel like the *Adeline Marie* would of necessity require the dislodging of an entire cargo. (Tr. M.S.-15). And, to illustrate the true essence of these Coast Guard "safety" inspections, one need only peruse the facts herein. Immediately upon the boarding of the *Adeline Marie,* Lieutenant Moon dispatched Customs Officer Carl Homer and First Class Petty Officer Arturo Lopez to "check the safety equipment." (Tr. M.S.-13). *Customs Officer* Homer was assigned the task of the safety inspection in spite of the fact that *he had never been aboard a vessel in his life* until this patrol. (Tr. M.S.-41). A safety inspection contemplates examining the entire ship for such things as the presence of fire extinguishers, life jackets, horns and bells, in the wheelhouse, engine room, galley, and every other conceivable nook and cranny of the ship. It is clear that a safety and documentation inspection, as presently conducted by the Coast Guard, is

not a limited and unintrusive invasion, but rather an exploitable opportunity to look for whatever evidence of criminal activity might be found.

Sea-going detentions pursuant to 14 U.S.C. § 89(a) are viewed by those entitled to execute them as just such an opportunity. In the case at bar, Lieutenant Moon candidly admitted that the purpose of the stop was to see if the *Adeline Marie* was carrying contraband. (Tr. M.S.-34). He testified that the entire boarding party was armed because they were enforcing criminal laws, and, that his purpose was to seek evidence of any type of violation he could think of. (Tr. M.S.-27, 34). Even before boarding it was his intention to go throughout the vessel. (Tr.-142). Ironically, the record establishes that the fishing vessel *Adeline Marie* was itself the subject of a fishing expedition, this time by the Coast Guard.

This Court has stated that the basic purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. One governing principle has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant. *Camara* v. *Municipal Court, supra* at 528, 529, 87 S. Ct. at 1731.

The Fifth Circuit characterizes seizures and searches made pursuant to 14 U.S.C. § 89(a) as administrative inspections. *United States* v. *Odom, supra* at 342. This Court has held the warrant requirement of the Fourth Amendment to be applicable in administrative inspection situations. Cf. *Marshall* v. *Barlows, Inc., supra* (warrant required for federal inspection under interstate commerce power of health and safety of workplace); *See* v. *City of Seattle, supra* (warrant required for inspection of warehouse for municipal fire code violations); *Camara* v. *Municipal Court, supra* (warrant required for inspection of residence for municipal fire code violations). As stated in *Marshall*:

> The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria. *Marshall* v. *Barlows, Inc., supra* at 323, 98 S. Ct. at 1826.

In noting the nature of the type of search found to require a warrant, this Court in *Camara* states:

> Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involved a relatively limited invasion of the urban citizen's privacy. *Camara* v. *Municipal Court, supra* at 537, 87 S.Ct. at 1735.

Your Petitioners submit that the warrantless seizures and search of the *Adeline Marie* was personal in nature, aimed at the discovery of evidence of crime, and virtually unlimited in scope.

This Court has had recent occasion to address the issue of warrantless seizures made without probable cause or reasonable suspicion to check documentation. In *Delaware* v. *Prouse, supra,* this Court stated:

> Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against "an objective standard," whether this be probable cause or a less stringent test. In those situations in which the balance of interest precludes insistence upon "some quantum of individualized suspicion," other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field. *Camara* v. *Municipal Court, supra,* at 532. *Delaware* v. *Prouse, supra,* 47 U.S.L.W. at 4325

In the case at bar there were no grounds for the seizure of the *Adeline Marie*. Initially, the *Adeline Marie* was merely another blip on the *Durable's* radar screen. Later, visual observation showed only a properly rigged shrimping vessel with her name, home port, and registry openly visible. There was no evidence that the *Adeline Marie* was riding low in the water, or that she exhibited any other form of irregularity. In fact, Commander Crosby, Captain of the *Durable,* testified that he had observed no difficulties at all. (Tr.-74, 75). Routine radio communication was established without incident. (Tr.M.S.-11). The seizing and boarding at issue here were totally without any suspicion of illegal or unsafe activity.

No "other safeguards" as referred to in *Prouse* above are recognized by the Fifth Circuit in its interpretation of 14 U.S.C. § 89(a) that would insulate individuals on any navigable waterway from arbitrary seizure and searches by the Coast Guard.

Applying the balancing test articulated in *Prouse*, it is apparent that the government interest in its intrusive behavior does not outweigh the interests protected by the Fourth Amendment. The government intrusion here was significant. The record shows that the safety and documentation inspection of the *Adeline Marie* was in reality a general investigatory search. The high expectation of privacy existing while an individual is at sea has been recognized by the Fifth Circuit. In *United States* v. *Cadena,* 588 F.2d 100 (5th Cir. 1979) the Fifth Circuit states:

> There is hardly the expectation of privacy even in the curtained limousine or the stereo equipped van that every mariner or yachtsman expects aboard his vessel. *United States* v. *Cadena, supra* at 101.

There can be no question that the subjective intrusion occasioned by being stopped and subjected to a warrantless search on the high seas by a heavily armed boarding party from a warship bristling with weaponry will have a particularly disquieting effect.

The government interest in safety conditions and documentation propriety can be vindicated by far less intrusive methods. In *United States* v. *Piner, supra,* the Ninth Circuit specifically notes the feasibility of dockside inspections of commercial vessels. The government interest in the prevention of fires, epidemics, and the safety of the workplace is surely greater than its interest in the quantity of life jackets, and other similar concerns, aboard a ship on the high seas. Yet these interests, vital to urban survival, were insufficient to override the warrant requirement in *Camara* v. *Municipal Court, supra; See* v. *City of Seattle, supra;* and *Marshall* v. *Barlows, Inc., supra.*

There is also the countervailing government interest in the free flow of American shipping to be considered. To heave to for boarding on the high seas and submit to a protracted search represents a time-consuming and costly aggravation to accomplish that which could be done conveniently by periodic inspection, licensing and requiring visible evidence of compliance. The highly intrusive effect of the type of official conduct now employed and its interference with the American shipping industry stand in sharp contrast to the government interest in the monitoring of compliance with federal safety and documentation standards which, in any event, could not be corrected on the high seas.

The procedure adopted by the Coast Guard in situations involving the seizure of foreign flag vessels illustrates that imposing the warrant requirement upon searches at sea would not be a serious burden on the Coast Guard. In *United States* v. *Conroy*, 589 F.2d 1258 (5th Cir. 1979), the Coast Guard obtained permission to enter Haitian waters by radio from the Haitian Chief-of-Staff. In *United States* v. *Dominguez*, —— F. 2d —— (4th Cir. Nos. 78-5112, 78-5114, 78-5115, slip opinion, August 10, 1979) the Coast Guard obtained permission from the government of the Commonwealth of the Bahamas, through the State Department, by radio, to board a vessel flying the Bahamian flag. Indeed, the Coast Guard headquarters in New Orleans occupies the same building as the federal courts. Considering the high level of modern communications technology, especially within the military sector, the requirement of a valid warrant for the boarding of an American flag vessel would not unduly burden the Coast Guard. A procedure similar to that already afforded foreign vessels would allow for the neutral and

detached determinations required by the Fourth Amendment. *Johnson* v. *United States*, 333 U.S. 10, 68 S.Ct. 367 (1948).

The doctrine espoused by the Fifth Circuit is in conflict with the applicable decisions of this Honorable Court, and the constitutionality of 14 U.S.C. § 89(a) should be addressed at this time.

On September 5, 1979, the Ninth Circuit handed down its decision in the case of *United States* v. *Piner*, *supra*. *Piner* addressed whether the boarding by the Coast Guard of a pleasure craft in San Francisco Bay for a routine documentation and safety inspection, without warrant and without probable cause or founded suspicion that a violation of the law had occurred, was a reasonable search under the Fourth Amendment. After noting that the safety regulations for pleasure craft, *unlike* commercial vessels, apply only when a vessel is in use, the Ninth Circuit concluded:

> [t]he random stop and boarding of a vessel after dark for safety and registration inspection without cause to suspect noncompliance is not justified by the governmental need to enforce compliance with safety regulations and constitutes a violation of the Fourth Amendment. *United States* v. *Piner*, *supra*, slip opinion at 3383.

In *Piner*, attorneys for the government argued that 14 U.S.C. § 89(a) authorized the warrantless seizure. The Circuit held that such a boarding, if not supported by a warrant or cause to suspect noncompliance, violates the Fourth Amendment. This is in direct conflict with the plenary authority granted by Fifth Circuit interpretations of 14 U.S.C. § 89(a). Your Petitioners respectfully urge this Honorable Court to resolve this conflict between the United States Courts of Appeal.

The recent state appellate court decisions in Florida and New York, noted above, further underscore the necessity of establishing uniformity in the application of Fourth Amendment rights. *Casal* v. *State*, *supra*, and *People* v. *Nissen*, *supra*, both require cause for the exercise of law enforcement boarding privileges. These decisions are at variance with the carte blanche bestowed upon sea-going police organizations by the Fifth Circuit. The Florida state courts have decided important questions of federal constitutional law in a manner conflicting with the presently applicable federal law. The need to resolve this inconsistency and to provide for uniform recognition of Fourth Amendment rights lends further urgency to the necessity of a Supreme Court examination to clear these murky waters.

Wherefore, Your Petitioners urge this Honorable Court to grant the instant Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
For The Fifth Circuit
No. 78-5713
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
BERT FRANKLIN ERWIN, II, JAMES DENNIS BROGLE AND ROBERT LAWRENCE CHESTER,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana.

(July 3, 1979)

Before CLARK, GEE and HILL, Circuit Judges.

PER CURIAM:

Bert Erwin, Robert Chester, and James Brogle were convicted by a jury in the Eastern District of Louisiana of conspiracy to import marijuana and conspiracy to possess with intent to distribute marijuana. We reject defendants' allegations on appeal and affirm the convictions.

On June 3, 1978, the Coast Guard cutter "Durable" was on routine patrol in the Gulf of Mexico when it

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* Rule 18, 5 Cir.; *see* Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al., 5 Cir., 1970, 431 F.2d 409, Part I.

sighted the "Adeline Marie," a shrimp boat out of Mobile, Alabama. The Coast Guard ordered the vessel, which was about 70 miles due south of the entrance of the Mississippi River, to heave-to for boarding to permit a safety and documentation inspection. The officers present also wished to inspect for any customs and narcotics violations that might be obvious. Lieutenant Moon, accompanied by four other Coast Guard members and a U.S. Customs Patrol Officer, boarded the vessel, asked defendant Erwin, who was aboard the "Adeline Marie" with the other two defendants, for the ship's documents, and immediately recognized the distinctive smell of marijuana. Moon wanted to see the ship's permanent identification number in the main hold, but Erwin said it was covered by cargo. He was right. What Moon saw upon opening the cargo hold was bales of marijuana partially wrapped in burlap. A full search was then conducted disclosing 1230 bales of marijuana weighing over 49,400 pounds stored in nearly every free space of the "Adeline Marie."

Defendants first challenge the constitutionality of the search for lack of probable cause. They argue that 14 U.S.C.A. § 89(a), which grants the Coast Guard authority to search and seize any vessel on the high seas subject to United States jurisdiction, violates the fourth amendment. This court en banc has previously upheld the constitutionality of section 89(a) in United States v. Warren, 578 F.2d 1058 (5th Cir. 1978). There is no question that the initial boarding of the "Adeline Marie" was proper under our holding in *Warren* that the Coast Guard has plenary authority to board a vessel beyond the twelve-mile limit without probable cause or any particularized suspicion. Once the Coast Guard boarded

the "Adeline Marie," the detection of the odor of marijuana furnished probable cause for the ensuing thorough search. United States v. Odom, 526 F.2d 339 (5th Cir. 1976).

Defendants moved in the trial court for a bill of particulars specifying where "in the Eastern District of Louisiana, and elsewhere" the charges in the indictment allegedly occurred. Pursuant to court order the government's final answer read "some of the marijuana was coming to the Eastern District of Louisiana." Defendants now urge that the government failed to prove that the destination of any of the marijuana was the Eastern District. This, they argue, created a fatal variance between the indictment and the proof at trial, which infected the propriety of venue in the Eastern District.

Defendants appear to assert that venue is appropriate only in a district in which an overt act in furtherance of the conspiracy was committed. Where an offense occurs on the high seas, however, the plain language of 18 U.S.C.A. § 3238 establishes venue "in the district in which the offender . . . is arrested or first brought"—in this case, the Eastern District of Louisiana. That venue may also be appropriate in another district will not divest venue properly established under § 3238. United States v. Williams, 589 F.2d 210 (5th Cir. 1979). Defendants do not urge any other possible prejudice from the alleged variance. They have not suggested that they had inadequate notice of the charges against them, or that they have been tried on charges not presented in the indictment. The charge is completely sufficient to eliminate any chance of their being prosecuted again for the same offense. Thus, assuming there is a variance, it is not one requiring reversal. United States v. Davis, 592 F.2d 1325

(5th Cir. 1979); United States v. Soto, 591 F.2d 1091 (5th Cir. 1979).

Defendants next argue that they were denied due process and equal protection because of the allegedly disproportionate penalties imposed for marijuana abuse as compared with other drugs by the continued classification of marijuana as a Schedule I controlled substance. They do not challenge the constitutionality of the initial classification but contend that the Attorney General has acted arbitrarily and unreasonably by refusing to reclassify the drug in the face of evidence of its relative harmlessness. The statute however by its terms merely permits the Attorney General to exercise his discretion within certain perimeters to transfer a substance. 21 U.S.C.A. § 811. There is no requirement to do so. These statutory procedures for administrative reclassification are constitutionally sound. United States v. Gordon, 580 F.2d 827 (5th Cir.), *cert. denied,* —— U.S. ——, 99 S.Ct. 731, —— L.Ed.2d —— (1978); United States v. Jones, 480 F.2d 954 (5th Cir.), *cert. denied,* 414 U.S. 1071, —— S.Ct. ——, —— L.Ed.2d —— (1973).

Finally, the defendants argue that the trial court did not properly instruct the jury that mere presence at the scene of the crime is insufficient to establish participation. The record reveals that the charge given informs the jury that actual or constructive possession requires intent to exercise control over the object. This was sufficient to preclude conviction for mere presence or proximity. United States v. Rojas, 537 F.2d 216 (5th Cir. 1976), *cert. denied,* 429 U.S. 1061, 97 S.Ct. 785, —— L.Ed. —— (1977).

AFFIRMED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
Office Of The Clerk
September 6, 1979

Tel 504-589-6514
600 Camp Street
New Orleans, La. 70130

To All Parties Listed Below:

No. 78-5713—U.S.A. vs. BERT FRANKLIN ERWIN, II, JAMES DENNIS BROGLE and ROBERT CHESTER

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
Clerk, U.S. Court Of Appeals
By Sally Hayward
_____
Deputy Clerk

cc: Mr. Michael L. Pritzker
Messrs. Earl N. Vaughan
Robert J. Boitmann